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The Use of Contract Interpretation by Professional Sports Arbitrators

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COMMENT

THE USE OF CONTRACT INTERPRETATION BY PROFESSIONAL SPORTS ARBITRATORS

[A]n Arbitrator decides cases exactly in the way my dear Grandma (on my Mother's side, that is) bought mushmelons at the fruit store. This was in the days before all those fancy cantaloupes, honeydews, Persian melons, and Casaba melons. What ever happened to the mushmelon, anyway? At any rate, she would ask the clerk to select some good melons for her. Then she would regard and inspect them with a fishy, skeptical, and cynical expression; and she would proceed to reject them out of hand on the sound theory that anything he tried to palm off on her as a good melon must be a bad one, *ipso facto*. She would then stretch to reach for melons, high in the fruit bin, and dig for others at the bottom of the pile. After subjecting them to rigorous visual inspection ("quality control," they now call it in our electronic plants), she would pick one out for color. This mushmelon she would then heft, musingly, in her hands for weight and volume. Then she would gently press the ends with her thumb, with just enough pressure to ascertain the ripeness and maturity of the fruit. Then, she would raise the mushmelon to her nose and delicately sniff its fragrance. And finally, she would draw upon a rich and varied lifetime of experience in selecting mushmelons - an experience marked by some few outstanding successes and by many disastrous and inexplicable goofs and bobbles. At this stage, all of the objective standards and tests would be abandoned as inadequate or transcended. She would turn her back on the evidence of her senses and choose to rely upon the ineffable and completely subjective criteria for judgment that are acquired only with living and coping with a problem for a long time. . . .The more one thinks about it, the more one gets persuaded. But if you should ask me (and I have a right to assume that you would) how an arbitrator makes his decisions, I should answer you - exactly as my Grandma chose mushmelons!

- Peter Seitz[1]

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1. Peter Seitz, *How Arbitrators Decide Cases: A Study in Black Magic*, PROC. OF THE 15TH ANN. MEETING OF THE NAT'L ACAD. OF ARB. 159, 164 (1962).

I. INTRODUCTION

Peter Seitz will forever be remembered as the author of the most famous sports-related arbitration case, the Messersmith-McNally Major League Baseball grievance, in which both plaintiffs were declared free agents in 1975.[2] I am sure that Arbitrator Seitz would be the first to admit that arbitrators' methods are slightly more exacting than his Grandma's. Everyone who interprets a contract - judges, lawyers, law professors, students and arbitrators - uses standards of interpretation to support their conclusions. Some theorists believe the standards should not be heavily relied upon, as they are inherently contradictory and "are useful only as facades, which an occasional judge may add lustre to an argument persuasive for other reasons."[3] In the specialized field of professional sports grievances, standards of interpretation take on greater importance. They are pillars drawn upon to support the arbitrator's decision. The standards serve as the tools the arbitrators employ to balance the interests of the athlete, the entertainer, and the employee within the boundaries of the collective bargaining agreement.

The purpose of this Comment is to discuss the methods of statutory or contract interpretation used by arbitrators in professional sports grievances. The most effective way to do this is through analysis of actual awards. Published sports arbitration or grievance awards are difficult to find. As such, this paper will refer specifically to three decisions: a 1992 National Hockey League opinion, a 1987 Major League Baseball opinion, and a 1990 Major League Baseball opinion. All three cases deal with contract interpretation between labor and management.

The labor dispute is a natural consequence of the American enterprise system in which workers organize into unions and negotiate with management in collective bargaining.[4] These disputes reflect each side's determination to receive what is perceived as an equitable amount of the profits earned by their collective efforts.[5] They also demonstrate the seriousness of the collective bargaining agreement, and the parties' desires that the guidelines of the collective bargaining agreement be enforced absolutely. The underlying reason for arbitration is to avoid costly production stoppages, such as strikes, and to provide a forum for discussion between the parties.[6]

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2. See Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615 (8th Cir. 1976) (*aff'g* Seitz's decision).

3. FRANK C. NEWMAN & STANLEY S. SURREY, LEGISLATION - CASES AND MATERIALS 654 (1955).

4. FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 1 (4th ed. 1985).

5. *Id.*

6. *Id.*

In the increasingly complex world of professional sports, arbitration has been the most effective means of avoiding costly litigation between parties, although some issues still do find their way into the courts.[7]

Strictly speaking, arbitration is a "simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding."[8] Professional athletics exemplifies an industry which quickly turned to arbitration after the introduction of collective bargaining.[9] Among its many advantages, arbitration claims the focused expertise of a specialized tribunal.[10] The costly and bulky procedures of the courts are not well adapted to the particular needs of labor-management relations.[11] Arbitration gives the parties a specialized tribunal, a forum in which the decision-makers are as familiar with the issues as the adversaries.[12] Given the complexity of the issues that surround a professional sports collective bargaining agreement, the arbitrator's knowledge of the issues is critical.

Arbitration is normally the final segment of a labor dispute settlement under collective bargaining agreements.[13] Collective bargaining between labor and management is not confined to the formal making of a collective bargaining agreement once every few years, but rather, is a daily process in which the grievance plays an important role.[14] The grievance procedure is usually well defined in the collective bargaining agreement. Usually, all preliminary negotiation between the parties in an attempt to settle the dispute must be exhausted before the case goes to arbitration.[15] A sample of this framework is found within the current Major League Baseball Basic Agreement (collective bargaining agreement):

B. Procedure

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7. Mark L. Goldstein Comment, *Arbitration of Grievance and Salary Disputes in Professional Baseball: Evolution of a System of Private Law*, 60 CORNELL L. REV. 1049 (1975).

8. Matthew N. Chappell, *Arbitrate. . . and Avoid Stomach Ulcers*, 2 ARB. MAG., Nos. 11-12, (1944).

9. GOLDSTEIN, *supra* note 7.

10. ELKOURI & ELKOURI, *supra* note 4, at 7.

11. Clark Kerr, *More Peace - More Conflict*, PROC. OF THE 28TH ANN. MEETING OF THE NAT'L ACAD. OF ARB. 8 (1976).

12. Harry T. Edwards, *Advantages of Arbitration Over Litigation: Reflections of a Judge*, PROC. OF THE 35TH ANN. MEETING OF THE NAT'L ACAD. OF ARB. 16 (1983).

13. ELKOURI & ELKOURI, *supra* note 4, at 153.

14. Chrysler Corp. v. UAW, 10 War Lab. Rep. (BNA) 551, 554 (1943).

15. For a discussion of the effect and exhaustion of preliminary negotiations upon the role and jurisdiction of the arbitrator, see *In re* Picture Frame Workers Union, 8 Lab. Arb. Rep. (BNA) 1063 (N.Y. Sup. Ct. 1947); *In re* Aluminum Co. of America, 12 War. Lab. Rep. (BNA) 446 (1943).

> Step 1. Any Player who believes that he has a justifiable Grievance shall first discuss the matter with a representative of his Club designated to handle such matters, in an attempt to settle it. If the matter is not resolved as a result of such discussions, a written notice of the Grievance shall be presented to the Club's designated representative, provided, however, that for a Grievance to be considered beyond Step 1, such written notice shall be presented within (a) 45 days from the date of the occurrence upon which the Grievance is based, or (b) 45 days from the date on which the facts of the matter became known or reasonably should have become known to the Player, whichever is later. Within 10 days following receipt of such written notice (within 2 days if disciplinary suspension or a grievance involving Player safety and health), the Club's designated representative shall advise the Player in writing of his decision and shall furnish a copy to the Association. If the decision of the Club is not appealed further within 15 days of its receipt, the Grievance shall be considered settled on the basis of that decision and shall not be eligible for further appeal.[16]

In other words, arbitration is the end to the whole grievance procedure, which is a continuing collective bargaining process itself.

Before analyzing how arbitrators use interpretation to decide grievances, it is necessary to define what constitutes a grievance. A grievance is a disagreement, dispute, conflict or irritation between two parties. The dispute is usually between labor, either individually or collectively, and management.[17] A grievance could be defined as *any type of complaint* by an employee or union against the employer, or vice versa, under the rights and/or duties of the collective bargaining agreement.[18] Under a collective bargaining agreement, a grievance is literally anything that the parties say it is.[19] For example, the Major League Baseball Basic Agreement provides:

> "Grievance" shall mean a complaint which involves the existence or interpretation of, or compliance with, any agreement, or any provision of any agreement, between the Association and the Clubs or any of them, or between a Player and a Club, except that disputes relating to the following agreements between the Association and the Clubs shall not be subject to the Grievance Procedure set forth herein.[20]

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16. Major League Baseball Basic Agreement, at 29 (1990).
17. ELKOURI & ELKOURI, *supra* note 4, at 155.
18. *Id.*
19. *Id.*
20. Major League Baseball Agreement, at 26.

The fact that parties find it necessary to define the term "grievance" within their collective bargaining agreement illustrates the widespread disagreement among labor relations authorities as to the exact meaning of the term.[21]

As the Baseball Agreement suggests, a grievance may arise from any infinite number of causes, as long as it pertains somehow to the Agreement. One arbitrator expressed how broad a grievance definition generally is: "Whether a man has a grievance or not is primarily his own feeling about the matter. Generally speaking, if a man thinks he has a grievance, he has a grievance."[22] The courts have agreed with this notion. In fact, one court explained that "a liberal and broad construction should be given to the term 'grievance' in the interest of encouraging the use of machinery which the parties themselves have set up for the peaceful settlement of disputes."[23]

II. ARBITRATION - THE LAST RESORT

As mentioned previously, when the parties have exhausted all other settlement negotiations, they turn to the final forum to settle the dispute: arbitration. Once the parties reach arbitration, the arbitrator alone has the fate of the dispute in his hands.[24] The arbitrator, like any other magistrate, must decide a labor dispute on its merits, weighing the evidence, listening to testimony, and wading through the written record.

No function of the labor dispute arbitrator is more important than his interpreting the collective bargaining agreement.[25] Only when the agreement, or part of it, is ambiguous will there be a need for contract interpretation.[26] If words are "plain and unambiguous" there is no need for the arbitrator to resort to methods of contract interpretation to settle the dispute.[27] Even if the language of the agreement is clear and plain on its face, ambiguity may still exist. Arbitrators refer to those situations "where the language appears clear on its face but becomes unclear when an effort is

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21. For citations to varying interpretations of the term 'grievance' see ELKOURI & ELKOURI, *supra* note 4, at 156, n.10.

22. Cudahy Packing Co. v. Packinghouse Workers Local 55, 7 Lab. Arb. Rep. (BNA) 645, 646 (1947) (Fisher, Arb.).

23. Forrest Industries Inc. v. Local Union No. 3-436, International Woodworkers of America, 381 F.2d 144, 146 (9th Cir. 1967).

24. For example, Major League Baseball uses an "Arbitration Panel" consisting of three persons to decide its arbitration cases.

25. ELKOURI & ELKOURI, *supra* note 4, at 342.

26. *Id.*

27. Continental Conveyor Co. v. Aluminum Workers Local 295, 51 Lab. Arb. Rep. (BNA) 1023 (1968) (McCoy, Arb.); Great Atlantic and Pacific Tea Co. v. Amalgamated Meat Cutters Local 347, 36 Lab. Arb. Rep. (BNA) 391 (1960) (Pollock, Arb.).

made to apply it to a given (fact) situation" as "latent ambiguity."[28] In the case of latent ambiguity, the arbitrator must determine the rights and intent of the parties under the agreement as if the agreement provision was ambiguous.[29] Most arbitrators consider agreements ambiguous where "plausible contentions may be made for conflicting interpretations."[30]

Very few collective bargaining agreements are considered unambiguous by arbitrators. The reason for this is that "[e]ven the most experienced negotiators cannot anticipate all the conditions and variations which can arise under a particular provision of the labor agreement."[31] The fact that almost all collective bargaining agreements provide for arbitration demonstrates that the parties realize that some language of the contract may be inherently ambiguous and that they could not possibly provide for all situations that may arise during the life of the agreement.[32] Even the most skillfull drafters cannot anticipate all the conditions and variations which may arise under a single provision. Arbitration is the most sensible way to fill in the gaps after the labor agreement is finished.[33]

III. THE USE OF CONTRACT INTERPRETATION BY THE ARBITRATORS

A. Intent - The Ultimate Goal

The arbitrator's ultimate goal, when faced with a legitimate grievance under a collective bargaining agreement, is to determine and carry out the mutual intent of the parties at the time they drafted the agreement.[34] An ambiguity within the collective bargaining agreement can arise where the parties did not express their intent clearly enough or where the parties did not foresee a particular fact situation arising under the agreement.[35] Situations also occur where the parties never gave any thought to the fact situation that has arisen. When any of these situations occur, it is up to the arbitrator to construct some form of "intent" where none existed.[36]

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28. *In re* Midwest Rubber Reclaiming Co., 69 Lab. Arb. Rep. (BNA) 198, 199 (1977) (Bernstein, Arb.).

29. *Id.*

30. Armstrong Rubber Manufacturing Co. v. United Rubber Workers Local 164, 17 Lab. Arb. Rep. (BNA) 741, 744 (1952).

31. W. C. Stoner, Comment, PROC. OF THE 26TH ANN. MEETING OF THE NAT'L ACAD. OF ARB. 80, 81 (1974).

32. Loew's, Inc. v. Office Employee's Local 174, 10 Lab. Arb. Rep. (BNA) 227, 232 (1948) (Aaron, Arb.).

33. Stoner, *supra* note 31, at 81.

34. ELKOURI & ELKOURI, *supra* note 4, at 343.

35. *Id.*

36. *Id.*

When called upon to determine the intent of the parties and the rights under the agreement, arbitrators use accepted standards of construction to interpret the agreement and its terms.[37] It should be noted that all written instruments, constitutions, statutes, contracts, and collective bargaining agreements are interpreted by the same general principles, although the specific subject matter may be strictly or liberally construed.[38] Contract interpretation allows the arbitrator to address the question of what the contract means on its face, through analysis of the contract's language. However, the language used often does not express the exact intent of the parties.[39] When this is the case, it is often necessary to examine the circumstances surrounding how and why the language of the agreement was chosen by the parties, including what the parties said and what information they used during the negotiation process.

B. Language - The Most Basic Tool of All

The arbitrator must determine the meaning of the agreement and the intent of the parties.[40] The language of the agreement itself is the arbitrator's most basic tool and enables him or her to make this determination. In Major League Baseball Grievance *88-1*, Arbitrator George Nicolau wrote that "in any contract interpretation case . . . the Panel must first look to the language of the provision at issue."[41] The arbitrators generally presume that the parties' negotiators are experienced and realize the implications of the language that they chose to express their intent in the agreement.[42] Therefore, the language of the agreement is the single most important tool an arbitrator can use to give himself an idea of what the parties were thinking when they drafted the agreement.[43]

Arbitrators use a number of contract interpretation standards and apply them to the language or words of the agreement. These standards are flexible.[44] They are "aids to the finding of intent, not hard and fast rules to be used to defeat the intent of the parties."[45] Arbitrators use these standards of contract construction as guides to interpret the contract provision.

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37. *E.g.*, Tri-County Metro. Transp. Dist. of Oregon v. Amalgamated Transit Unit, 68 Lab. Arb. Rep. (BNA) 1369, 1370 (1977) (Tilbury, Arb.).

38. Smith Steel Workers v. A.O. Smith Corp., 105 L.R.R.M. (BNA) 2044 (7th. Cir. 1980).

39. *See* ELKOURI & ELKOURI, *supra* note 4, at 342.

40. *Id.* at 348.

41. Major League Baseball Players Association v. Twenty-Six Major League Clubs 1, 16 (1990) (Nicolau, Arb.).

42. 12 Am. Jur. *Contracts* § 227 (1938).

43. *Id.*

44. ELKOURI & ELKOURI, *supra* note 4, at 344.

45. Republic Steel Corp., 5 Lab. Arb. Rep. (BNA) 609, 614 (1946) (McCoy, Arb.).

One standard used by arbitrators is the plain meaning rule. The plain meaning rule provides that the meaning of the provision should be determined by looking within the four corners of the agreement, i.e., the document's language itself, and that the arbitrator cannot ignore the clear-cut meaning of the contractual language.[46] If the language of the document is clear and unambiguous on its face, arbitrators generally agree that the provision must be interpreted without the aid of extrinsic evidence and must be given the meaning that is clearly expressed.[47] In an arbitration, usually at least one party will urge the arbitrator to look at the plain meaning of the contract. This was the situation in Baseball Grievance *88-1*, where "the Clubs urge[d] the Panel to 'reject' the *Association's 'invitation to look only at the plain language* of Article XVIII(H) and ignore evidence concerning . . . intent and effect.' "[48] The Association attempted to gain an edge by urging the Panel to look at the plain language of the provision. The provision had read:

> H. Individual Nature of Rights
> The utilization or non-utilization of rights under this Article XVIII is an individual matter to be determined solely by each Player and each Club for his or its own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other Clubs.[49]

If the Panel applied the plain meaning rule to this provision, the Clubs could not introduce evidence of intent, effect, bargaining history, and the conduct of the parties over the years. All of this extrinsic evidence would be rendered useless if a strict plain meaning rule were applied. However, the plain meaning rule is generally not applied if reasonable persons could disagree as to the intent and meaning of the provision.[50] Thus, a strict plain meaning rule, and exclusion of extrinsic evidence, is not commonly used in professional sports arbitration cases.[51]

Another standard of construction, one that is frequently used, is the process of giving the language of the agreement the ordinary and popular

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46. Clean Coverall Supply Co. v. Laundry Workers Local 108, 47 Lab. Arb. Rep. (BNA) 272 (1966) (Whitney, Arb.).

47. Phelps Dodge Copper Prods. Corp. v. International Union of Electrical Workers Local 446, 16 Lab. Arb. Rep. (BNA) 229 (1951) (Justin, Arb.).

48. Grievance 88-1, *supra* note 41, at 16.

49. *Id.* at 3; Major League Baseball Players Association v. Twenty-Six Major League Baseball Clubs A-123, A-124 (1987) (Roberts, Arb.) (emphasis added).

50. *See generally* ELKOURI & ELKOURI, *supra* note 4, at 344.

51. *See* National Hockey League Grievance, *Average League Salary* (1992) (St. Antoine, Arb.); Major League Baseball Players Association v. Twenty-Six Major League Clubs 1 (1990) (Nicolau, Arb.).

meaning.[52] Under that standard, words and phrases are given their ordinary, everyday meaning absent some indication from the parties that another meaning was intended.[53] Dictionary definitions are often used to determine ordinary and popular meanings of words.[54] For example, when looking for a relationship between the words "salary" and "periodically," Arbitrator Theodore St. Antoine used this method in his National Hockey League arbitration. St. Antoine said that "[p]eriodicity is plainly an element in the standard dictionary definition of salary," *citing, Random House Dictionary of the English Language,* 1693 (2d ed. unabr. 1983); *Webster's New International Dictionary,* 2203 (2d ed. unabr. 1983).[55] This method is often expanded to the contract provision as a whole, where the arbitrator will interpret the entire provision to give it an "ordinary and popular" meaning. An example can be found in Major League Baseball Grievance *86-2,* where Thomas Roberts interpreted the ordinary meaning of Article XVIII(H), dispute dealing with player free agency. Roberts said:

> The provision declares that the utilization or non-utilization of free agency shall be an individual matter determined solely by each player and club for his or its benefit. With regard to free agency, players may not act in concert with other players and clubs may not act in concert with other clubs.[56]

After giving meaning to the words or provision of the agreement, the arbitrator can then look to the specific facts of the dispute and how they are affected under the agreement. For example, in the Baseball disputes, after giving meaning to the language, the arbitrators will look to the conduct of the owners and whether or not that conduct violated the provision in question. Before analyzing the specific conduct of the owners, Roberts explained:

> in the context of the present inquiry any agreement or plan involving two or more of the clubs and governing the manner in which they will or will not deal with free agents is contractually forbidden . . . . A common scheme or plan directed to a common benefit is in violation of the bargain of the parties.[57]

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52. ELKOURI & ELKOURI, *supra* note 4, at 350.

53. Vlasic Foods v. United Dairy Workers Local 87, 74 Lab. Arb. Rep. (BNA) 1214, 1217 (1980) (Lipson, Arb.).

54. Cincinnati Post & Times Star v. Cincinnati Newspaper Guild Local 9, 68 Lab. Arb. Rep. (BNA) 129, 138 (1977) (Chalfie, Arb.).

55. Hockey Grievance, *supra* note 51, at 12 (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1693 (2d ed. unabr. 1983); WEBSTER'S NEW INTERNATIONAL DICTIONARY 2203 (2d ed. unabr. 1983).

56. Major League Baseball Players Association v. Twenty-Six Major League Baseball Clubs A-123 (1987) (Roberts, Arb.).

57. *Id.*

Arbitrator St. Antoine used a similar method to arrive at an acceptable definition of "average player salary." In the National Hockey League Grievance, St. Antoine wrote: "[t]here is a *well-accepted approach* when one is trying to strike an average among a group of variable factors, so as to give effect to all the factors and yet take appropriate account of their variations."[58]

C. Context - The Most Important Tool

Another important standard in interpreting the language of a collective bargaining agreement is the use of context.[59] Meaning can be given to ambiguous or doubtful provisions by construing them in the light of the context of the agreement.[60] *Noscitur a sociis* is an old maxim that summarizes the rule both of language and of law that the meaning of words and provisions may be controlled by those with which they are associated.[61] Agreement language cannot be interpreted within a factual vacuum. In a labor grievance situation, if the agreement provision is ambiguous, the arbitrator must look to other sources for guidance.[62] The language being interpreted by the arbitrator must be considered in the context of all the other words and provisions by which it is surrounded. In other words, the contract must be interpreted as a whole document.[63] If the arbitrator chooses to use extrinsic evidence, context will allow the arbitrator to use the history of the parties' bargaining relationship,[64] the nature of the industry or business,[65] and all other relevant circumstances surrounding the subject dispute. In the arena of professional sports arbitration, context is the most important standard used by the arbitrators. The complexity of the issues involved in professional sports demands that the arbitrators give the most weight to

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58. Hockey Grievance, *supra* note 51 at 10.

59. ELKOURI & ELKOURI, *supra* note 4, at 356.

60. Ex-Cell-O Corp. v. International Ass'n. of Machinists Dist. Lodge 169, 85 Lab.Arb. Rep. (BNA) 1190 (1985) (Statham, Arb.); Firestone Tire & Rubber Co. v. United Rubber Workers of America Local 510, 20 Lab. Arb. Rep. (BNA) 880 (1953) (Gorder, Arb.).

61. 4 Samuel Williston & Walter H.E. Jaeger, A Treatise on the Law of Contracts, § 618 (3d ed. 1961).

62. Firestone Synthetic Rubber and Latex Co., 76 Lab. Arb. Rep. (BNA) 968 (1981) (Williams, Arb.).

63. Anaconda Co. v. Uranium Metal Trades Council, 74 Lab. Arb. Rep. (BNA) 345, 347 (1980) (Gowan, Arb.).

64. For discussion *see* ELKOURI & ELKOURI, *supra* note 4, at Chapter 12 entitled "Custom and Practice." Elkouri states that the "use of past practice to give meaning to ambiguous contract language is so common that no citation of arbitral authority is necessary." However, Elkouri does note that "the weight to be accorded past practice as an interpretation guide may vary greatly from case to case." *Id.* at 451-52.

65. ELKOURI & ELKOURI, *supra* note 4, at 360-61.

contextual arguments. Although each of the arbitrators discussed in this comment uses his own style in reaching a decision, all three arbitrators rely heavily on context.

IV. AN EXAMINATION OF ACTUAL AWARDS

A. St. Antoine's NHL Grievance Award

In the arbitration of *National Hockey League Players Association and The National Hockey League Member Clubs*, Gr: "Average League Salary," Arbitrator St. Antoine faced the task of finding the meaning of the term "average League salary." More specifically, the issue in the grievance was:

> What constitutes "average League salary" with respect to the agreed-upon language (of the collective bargaining agreement) that reads: "A player who has completed ten professional seasons or more (Minor or NHL) and who in the last year of his contract did not earn more than the *average League salary*, can elect once in his career to become an unrestricted free agent at the end of his contract." (The parties have agreed previously that the term "ten professional seasons or more [minor or NHL]" does not include junior hockey and hence the parties have no dispute before the arbitrator concerning this subject.)[66]

The issue above was substantially agreed to on April 10, 1992, and was presented to the arbitrator on July 23, 1992, when the parties realized that there was no definition of average League salary on which they could agree.[67] In fact, testimony before Arbitrator St. Antoine alleged that there was "no specific discussion of the meaning of average League salary" and "no specific discussion of any formula for determining the average salary."[68] Both the players and the clubs had their own idea of what the term meant. Then-NHL President John Ziegler said "[average salary] got to be kind of a joke between us . . . [the] Players Association had their average salary. And we had our average salary. And we agreed to disagree."[69] During the dispute, each side argued how the other defined "average League salary."

The players argued that throughout the 1991-92 collective bargaining negotiations the League calculated average salary on the money received by the top 20 players on each team. This figure was determined to be $379,000 for the 1991-92 season.[70] The players alleged that the League used this as

66. Hockey Grievance, *supra* note 51, at 3.
67. *Id.*
68. *Id.* at 2.
69. *Id.* at 4.
70. *Id.* at 3.

"a core element in its overall economic presentation accompanying its bargaining proposals to the Association (Players)."[71] Contrary to this, the League alleged that the parties "never intended that the term 'average League salary' would be limited to the average of only the 'top' 20 players on 21 teams in the National Hockey League."[72] The League pointed out that, during collective bargaining, the players insisted that the average League salary was less than the figures cited by the League, i.e., the figures using only the top 20 players on each team.[73] Therefore, the League asserted, and Ziegler testified, that "the average League salary was understood by . . .the Association, in the context of ten-year free agency, to encompass everybody playing in the League, not just the top 20 per team."[74] The League maintained that to include all the players who played "made much more sense" since "all of these players [had] contribute[d] to the product."[75]

Cleverly, St. Antoine pointed out the irony that "each side is now insisting essentially on promoting the meaning of 'average League salary' that it strongly resisted during the whole course of the 1991-92 negotiations."[76] Not only is this ironic, but it was critical to St. Antoine's ultimate finding.[77] It is important to note that the standard of context encompasses the theory that where the meaning of a term within an agreement is ambiguous, the parties intended it to have the same meaning as that given it during the negotiations leading up to the agreement.[78] St. Antoine used the standard of context and specifically referred to the past bargaining positions of the parties to reach his conclusion that neither side made clear to the other the meaning it was attributing to the phrase.[79] On this basis, St. Antoine rejected the standard that would call for him to assign one of the pre-agreement meanings to average League salary. Within his award, St. Antoine noted that, within professional sports arbitration, "all sides should be wary

71. *Id.*
72. *Id.* at 6.
73. *Id.*
74. *Id.* at 6.
75. *Id.* at 6-7.
76. *Id.* at 7.
77. *Id.*
78. Genova Penn., Inc., 99 Lab. Arb. Rep. (BNA) 475 (1992) (DeLauro, Arb.); N-Ren Corp. v. Oil Workers Local 6-662, 81 Lab. Arb. Rep. (BNA) 438, 442 (1983) (Boyer, Arb.); Maine Employment Sec. Comm'n v. Maine State Employees Ass'n, 74 Lab. Arb. Rep. (BNA) 17, 19-20 (1980) (Babiskin, Arb.).
79. Hockey Grievance, *supra* note 51, at 7.

about transporting the terminology employed in those exchanges (precontract negotiations) into important provisions of a contract."[80]

Finally, St. Antoine used one other important standard of interpretation in reaching his decision: avoidance of a harsh, absurd, or nonsensical result.[81] Arbitrators strive to give language a construction that is reasonable and equitable to both parties, especially when the positions of the parties would lead to an absurd result.[82] St. Antoine noted that each party's approach to "average League salary" would yield an incorrect figure: "just as the Association's approach would skew the average upwards, the League's would tilt it downwards."[83] He explained that "a reasonable person would find a serious flaw in the interpretation of both parties."[84] In other words, the definitions provided by the parties would produce a nonsensical result in this case. Having dispensed with the definitions provided by the parties, St. Antoine set out to find "a reasonable meaning" to be "assigned to the language they chose as an expression of their agreement."[85] Using equity and reason to reach a sensical result, St. Antoine found that "average League salary" should be "based on the salaries of *all the individuals* who play in one or more games in the NHL during a season, but it should be a *weighted average*, taking into account the number of games played by each individual."[86] In reaching this decision, St. Antoine, like Nicolau and Roberts, relied on his experience and the standards of interpretation to reach an equitable and sensical result. Most importantly, St. Antoine determined the meaning of "average League salary" within the context of ten-year free agency in the National Hockey League, and the issues that surround that particular provision of the agreement.

B. Robert's Baseball Grievance Award

In the Major League Baseball grievance decision, "Grievance No. *86-2*," Arbitrator Thomas T. Roberts evaluated the claim of the Major League Baseball Players Association that the Clubs and Owners had " 'been acting in concert with each other with respect to individuals who became free

80. *Id.* at 8.

81. ELKOURI & ELKOURI, *supra* note 4, at 354.

82. John Morrell & Co. v. United Food Workers Local 304A, 76 Lab. Arb. Rep. (BNA) 1017, 1022 (1981) (Nathan, Arb.); Fort Pitt Steel Casting Division v. United Steelworkers Local 1406, 76 Lab. Arb. Rep. (BNA) 909, 911 (1981) (Sembower, Arb.).

83. Hockey Grievance, *supra* note 51, at 9.

84. *Id.* at 10.

85. *Id.*

86. *Id.* at 13.

agents under Article XVIII after the 1985 season.' "[87] Again, the contract provision Roberts had to deal with was Article XVIII(H) of the Major League Baseball Basic Agreement. That Article expressly provides:

> The utilization or non-utilization of rights under this Article XVIII is an individual matter to be determined solely by each Player and each Club for his or its own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other Clubs.[88]

In his analysis, Roberts examined the history behind the agreement provision. He noted that the language cited above was "originally proposed by the Clubs during the 1976 negotiations in response to a fear that individual players might join to 'package' or sell their newly created free agency rights."[89] Looking at the history behind the language, another of the methods of interpretation commonly used by arbitrators, Roberts gained insight into the parties' original intent when they drafted the provision. He concluded that the provision was drafted to "recognize[ ] the tradition of individual salary negotiations in major league baseball but it is designed to guarantee that individual players negotiate with individual clubs."[90]

The grievance in *86-2* centered around the free agent activities that took place during the 1985-86 baseball off-season.[91] The players alleged that "what occurred in the free agency market during the 1985-86 off-season [w]as a 'boycott' in which all twenty-six major league clubs participated with an intent to destroy free agency."[92] The players claimed this action by the Clubs violated Article XVIII(H) of the Basic Agreement. In their defense, the Clubs argued that the inactivity of free agents during the 1985-86 off-season "was nothing more than the culmination of a predictable evolution to a more sober and rational free agent market."[93] They argued that no agreement existed between the Clubs and that each Club "made rational independent decisions regarding the employment of free agents, decisions based upon legitimate baseball, business management and financial factors" to limit their financial spending in the off-season.[94] The Clubs also made a

87. Major League Baseball Players Association v. Twenty-Six Major League Baseball Clubs A-123 (1987) (Roberts, Arb.).

88. *Id.* at A-124.

89. *Id.* Roberts also noted that the players demanded the Clubs be subject to the same restraint, thus creating the final language that appears in the Agreement.

90. *Id.*

91. *Id.* at A-125.

92. *Id.* at A-126.

93. *Id.* at A-126.

94. *Id.*

more fundamental and pragmatic argument that the free agent "pool" in that particular year was not very attractive to the teams.[95]

Early in his decision, Roberts discussed the meaning, intent, and application of the provision at issue. He interpreted the language within the context of free agency, and its history preceding the off-season of 1985-86.[96] Roberts explained his definition of the provision and then examined the facts of the specific grievance to determine if a violation of the parties' agreement had occurred. According to Roberts, the context of this case demanded that Article XVIII(H) prohibit "any agreement or plan involving two or more of the clubs and governing the manner in which they will or will not deal with free agents."[97] Having defined the Agreement provision, Roberts detailed the history of the free agent market and the events leading up to the 1985-86 off-season.[98]

The events of the 1985-86 off-season were termed by Roberts as "the sudden and abrupt termination of all efforts to secure the services of free agents from other clubs."[99] No free agent received any offers from other Clubs until his former Club declared a lack of interest in re-signing the player. Roberts used "context," specifically the history of the free agent industry, to determine if the off-season conduct of the Clubs was a violation of their collective bargaining agreement. He found that "[o]nly a common understanding that no club will bid on the services of a free agent will" provide assurance that a free agent will remain with his original club without a bidding war and "[t]his, in itself, constitutes a strong indication of concerted action."[100] In his discussion, Roberts compared the off-seasons of 1984-85 and 1985-86. In 1984-85, twenty-six of the forty-six free agents changed clubs during the off-season. This could be considered a normal free agent season. In 1985-86, only four of thirty-two possible free agents signed with different teams, and only one received an offer from a new club before his former club was no longer interested.[101] The Clubs argued that the condition of the free agent market in 1985-86 was the result of a general feeling among the owners that highly paid free agents with long-term contracts did not play well.[102] They also argued that despite this feeling, free agent salaries were still very attractive to the players as clubs offered gener-

95. *Id.*
96. *Id.* at A-127.
97. *Id.*
98. *Id.* at A-127-135.
99. *Id.* at A-128.
100. *Id.* at A-130.
101. *Id.* at A-132.
102. *Id.* at A-129.

ous salaries to their own free agents because of a fear that other clubs might lure them away.[103] Roberts rejected this argument as illogical and inconsistent with the existence of a free market.[104].

Arbitrators often use custom and past practice of the parties as evidence to provide the basis for rules included in the contract, to support amendments to the original contract, or to indicate the proper interpretation of language within the contract.[105] Along these lines, Roberts pointed to the rhetoric of owners and the commissioner at meetings immediately before and during the off-season of 1985-86. Statements such as Clubs should "exercise more self discipline in making their operating decisions"[106] and "[i]t is not smart to sign long-term [free agent] contracts,"[107] provided Roberts with enough evidence of the Clubs' intent to find a violation of Article XVIII(H) of the Basic Agreement.

Roberts' decision, unlike St. Antoine's, had a only small amount of provision interpretation, concentrating more on the analysis and history of the parties' actions. This difference is attributable to the different fact situations of each grievance, demonstrating the need for flexibility on behalf of the arbitrator. However, both arbitrators did rely heavily on context and the unique issues that surround professional sports.

C. Nicolau's Baseball Grievance Award

In "Grievance *88-1*," George Nicolau was faced with the same contract provision as Roberts, Article XVIII(H) of the Major League Baseball Basic Agreement. In *86-2*, Roberts had found that the Clubs violated the provision during the 1985-86 off season. In *87-3*, Nicolau had found that the Clubs had acted in concert to restrain the free agent market during the 1986-87 off season, again violating the same Agreement provision.[108] In *88-1*, Nicolau was faced with the same question: did the Clubs' conduct violate Article XVIII(H)?

The facts in this grievance were very different from those in *86-2*. At the center of this dispute was an Information Bank ("Bank") set up by the Major League Baseball Player Relations Committee ("PRC") in the fall of

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103. *Id.* at A-133-34

104. *Id.* at A-134.

105. ELKOURI & ELKOURI, *supra* note 4, at 437.

106. Major League Baseball Players Association v. Twenty-Six Major League Baseball Clubs A-123, A-136 (1987) (Roberts, Arb.).

107. *Id.* at A-137.

108. Major League Baseball Players Association v. Twenty-Six Major League Clubs 1 (1990) (Nicolau, Arb.).

1987.[109] Through the Bank, Clubs could advise the PRC of salary offers they were making to free agents and could learn what, if any, offers were being made by other Clubs.[110] The Players argued that the Bank's purpose and effect was to lower free agent salaries and depress the market.[111] The Clubs, on the other hand, argued that the Bank stimulated free agent competition and eliminated secretive inter-club discussions to which the players have always objected.[112] Unlike Roberts, Nicolau had to apply the intent and meaning of Article XVIII(H) to a scenario, the creation of the Bank, that the parties never anticipated. Nicolau noted that this "centralization of information" was unlike any exchange baseball had ever seen.[113]

In a very thorough decision, Nicolau described the Bank in great detail. He said that the:

> [U]se of the Bank, whether for reporting offers made to free agents or seeking information on what offers had already been made, was voluntary. Second, the Bank was only to receive and record actual offers, not possible offers or expressions of interest. Third, those operating the Bank . . . were not to comment on offers or the lack thereof, nor seek out bidding information except at the request of a Club seeking to confirm such information, including what an agent had told its representatives.[114]

The Clubs said the Bank was established to eliminate secretive discussions, but as extrinsic evidence showed, many Clubs used the Bank to track the offers of other Clubs to determine just how much they would have to spend to get a particular player.[115] Although many aspects of the Bank remained unclear to Nicolau, it was clear the Clubs had never before exchanged so much information about free agent bidding.[116]

Unlike the off-seasons of 1985 and 1986, the 1987 off-season saw "normal" free agent activity. Fifteen of seventy-six free agents had offers from more than two clubs.[117] In nearly every free agent case, the player's salary substantially increased.[118] However, the players argued that there was "something wrong" with the market and, upon filing a grievance, con-

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109. *Id.* at 2.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 9.
114. *Id.* at 8.
115. *Id.* at 9.
116. *Id.* at 9-10.
117. *Id.* at 10.
118. *Id.* at 11.

cluded the Bank was limiting the free agent market.[119] The players argued that the Bank violated the "plain" language of Article XVIII(H) and that the Bank's purpose and effect violated the intent of Article XVIII(H).[120]

The players said the action of recording bids in the Bank could not be " 'solely . . . for [a Club's] . . . own benefit . . .' " as XVIII(H) required, but was for the mutual benefit of other Clubs.[121] The players argued that a Club could not help itself by revealing bidding information to other Clubs.[122] They argued that the plain meaning rule should apply and that the Bank should be declared a *per se* violation of XVIII(H).[123] However, Nicolau was reluctant to apply a strict plain meaning approach. Instead he used a liberal approach, concentrating on the intent of XVIII(H) and the effect of the Bank upon the free agent system in light of the context of the relationship between the players and Clubs.

The players further argued that the Bank was established to allow the Clubs to aid each other in negotiations and to restrict the players' salaries, especially those of free agents.[124] The Clubs, on the other hand, maintained that the Bank was designed to enhance salary competition and to protect the Clubs from the crafty agent who fraudulently inflated offers a player had received in an attempt to raise his client's salary.[125] The Clubs also argued that neither the prior actions of the parties nor the bargaining history of Article XVIII prohibited the type of information exchange contemplated by the Bank.[126] They argued that previous grievance cases demonstrate that the exchange of information within the Bank has little or no effect upon the free agent market and, therefore, cannot be a violation of XVIII.[127]

In constructing his decision, Nicolau first analyzed the language of the provision within the context of the Bank's implementation.[128] Nicolau recognized that the language of XVIII(H) could not be taken literally because any form of free agent bidding has "collective implications."[129] Neither players nor Clubs negotiate independently. Rather, they often "seek advice

119. *Id.* at 13.
120. *Id.*
121. *Id.* at 14.
122. *Id.*
123. *Id.* at 13.
124. *Id.* at 14.
125. *Id.* at 15.
126. *Id.*
127. *Id.*
128. *Id.* at 16-17.
129. *Id.* at 17.

and counsel before taking particular steps."[130] However, Nicolau distinguished these common cases from the particular action in this case. The PRC established the Bank as "an undisclosed mechanism through which *all* major league clubs could transmit, receive, share and act upon free-agent bids."[131] Nicolau came to the conclusion that such a Bank clearly fit within the prohibitive language, "acting in concert," of XVIII(H).[132] The Clubs had relied on the fact that the drafters of XVIII(H) did not contemplate the exchange of such information and therefore could not have possibly intended to ban such an exchange.[133] Nicolau conceded this argument, noting that there was virtually no discussion on such an issue. However, Nicolau did assert his power as an arbitrator by saying that:

> "[T]his failure of either Party to expressly allude to something . . . in the negotiations . . . does not justify a conclusion that the Bank cannot fall within the provision's proscription. The meaning of a clause is rarely drawn from what is unsaid; it is derived from the words parties use to embody their understanding.[134]

Nicolau went on to note that in previous grievance cases, the Clubs had argued *against* the conclusion which they were now arguing in this case.[135]

Like St. Antoine in the Hockey Grievance, Nicolau found that the parties "agreed to disagree" as to the meaning of XVIII(H).[136] Negotiations to change the language of XVIII(H) had failed in the past and the players attempted to change the language, but no acceptable form could be found. The Clubs argued that this was evidence that XVIII(H) was never intended to prohibit the exchange of this type of information because, if this was not the case, the players would have no other motivation to change the provision.[137] The players contended that they were not trying to change the meaning of the provision, they were just "seeking language" that would more clearly spell out the intent.[138] Nicolau sided with the players, concluding that "the [Players] Association was not seeking something it

130. *Id.*
131. *Id.* at 17.
132. *Id.* at 18.
133. *Id.*
134. *Id.* at 19.
135. *Id.* at 19-20. The Clubs argued that there was no difference between the Bank and the advice and information the Association and the PRC began giving players after the 1976 negotiations and that if the latter is not prohibited, as the Clubs had argued, then neither is the former.
136. *Id.* at 21-23.
137. *Id.* at 23.
138. *Id.*

thought it didn't have, but was seeking to clarify what, in its view, the language already meant."[139]

Like Roberts in *86-2*, Nicolau based his decision largely upon the context in which the facts arose. In this case, it was the Information Bank.[140] Nicolau found that the Bank was an extreme break from the past conduct of the parties.[141] First, it was a secretive, centralized operation created by the Clubs through which they could obtain precise salary and contract-related information.[142] Second, even though the players were "dimly aware" of inter-club communication in the past, the Bank was a totally different operation.[143] The PRC recommended that all Clubs use the Bank and actively encouraged Club participation. Thus, Nicolau asserted that the Bank could not reasonably be perceived to be "a narrowing" of what went on before or "a mere exchange of information."[144]

Given the scope of the Bank within the context of free agency and the process of salary negotiations, Nicolau found that the Bank was inconsistent with the intent of XVIII(H), to have Clubs use rights under the provision for their own benefit.[145] Finally, Nicolau dismissed the Clubs' argument that the Bank could not be found to violate XVIII(H) if the Bank was not intended to restrain the free agent market.[146] He found no logical reason to believe that the Bank was designed to stimulate free agent competition. Nicolau stated that there could be "little question that the Information Bank was intended to affect free agent salaries and intrude on the free agency process. It does so by its very nature. . . [I]t is evident that the Bank was not established to offer free agents more money than achievable without a Bank."[147] Nicolau reasoned that the Bank was inspired by Roberts' decision in *86-2*, and in that context "the Bank's message was plain — if we *must* go out into that market and bid, then let's quietly cooperate by telling each other what the bids are. If we all do that, prices won't get out of line and no club will be hurt too much."[148] When Nicolau looked at the Bank in its proper context, against the backdrop of free agency, he found that it violated the meaning and intent of XVIII(H): to promote the individual-

139. *Id.*
140. *Id.* at 26.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 27.
146. *Id.* at 28.
147. *Id.* at 30.
148. *Id.* at 31.

ized bargaining system and forbid the parties *"to act in concert"* when negotiating player contracts.[149]

V. CONCLUSION

St. Antoine, Roberts, and Nicolau have their unique styles, but all three arbitrators are more alike than different. As arbitrators, their primary objective is to interpret the contract provision in question and produce a result that is equitable and just. They all use established standards of interpretation to help give meaning to the language of the provision and arrive at a decision. In some cases, such as in the hockey grievance, this involved interpreting only a few words. In the baseball grievances, Roberts and Nicolau dealt with an entire section of the collective bargaining agreement. However, in all three decisions, the same standards of interpretation were used: the meaning of the language itself, the bargaining history and prior practices of the parties, the context within which the grievance arose, and the avoidance of an absurd or nonsensical result.

Standards of interpretation are but "aids" to be used by the arbitrator. These three decisions are good examples of the standards being used to sustain a particular interpretation as a viable alternative. The standards provide support for the meaning assigned by the arbitrator as a possible and reasonable interpretation. It is the ultimate task of the arbitrator to find the interpretation that is not only reasonable, as supported by standards, but also the most equitable and just given the context of the grievance. In professional sports arbitration awards, the arbitrator needs to rely on the context of the grievance to provide the guidelines within which a particular decision must fall. Given the complexity of issues surrounding professional sports today, context is the main source of justice for the arbitrator. If standards of interpretation are the tools by which an arbitrator forges a just and equitable resolution to a dispute, then the use of context is the arbitrator's biggest and most effective tool.

JAMES GILBERT RAPPIS

149. *Id.* at 33.